No. 80-940

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

LONE STAR STEEL COMPANY

and

UNITED MINE WORKERS OF AMERICA

UNITED MINE WORKERS OF AMERICA'S RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAYNARD I. UNGERMAN
JOHN B. WIMBISH
Ungerman, Conner, Little,
Ungerman & Goodman
Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 584-6101
Counsel for United Mine Workers of America

Cone-Lewis Printing Co. • 323 E. 3rd • Tulsa, Okla. 74120 • Phone (918) 582-1234

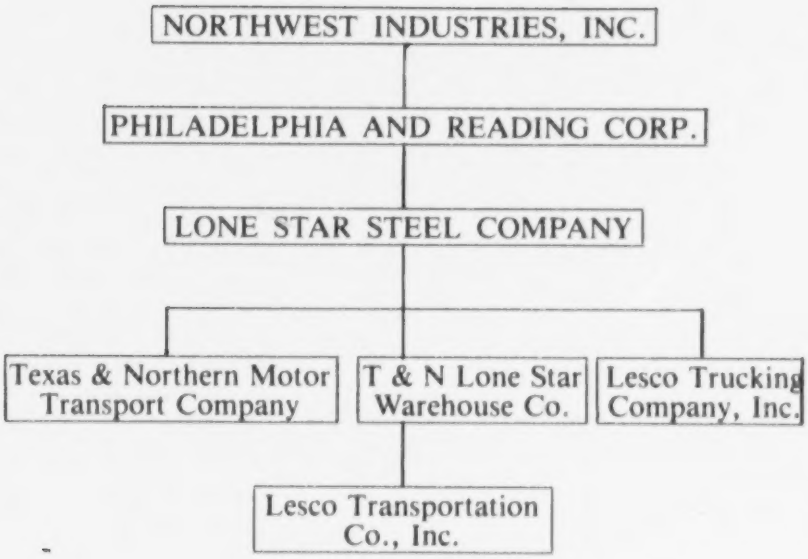
NORTHWEST INDUSTRIES, INC.
PHILADELPHIA AND READING CORP.
LONE STAR STEEL COMPANY
Texas & Northern Motor Transport Company
T & N Lone Star Warehouse Co.
Lesco Trucking Company, Inc.
Lesco Transportation Co., Inc.

TABLE OF CONTENTS

Page

Counterstatement of the Questions presented in the Cross-Petition in Case No. 80-940 1

Opinions Below 2

Jurisdiction 2

Counter-Statement of the Case 2

A. The Facts 2

B. The Rulings Below 5

Brief in Opposition to Cross-Petition No. 80-940 5

Conclusion 8

AUTHORITIES CITED

CASES:

Amax Coal Co. v. NLRB,
614 F.2d 872 (1980) reversing in part 238 NRLB 214, petitions for cert. pending, Nos. 80-289 and 80-692 ..... 5, 6

Fibreboard Paper Products Corp. v. NLRB,
379 U.S. 203 (1964) 7

Teamsters Union v. Oliver,
358 U.S. 283 (1959) 6, 8

STATUTES:

National Labor Relations Act, as Amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C.)

§158(b)(3) 5

§158(d) 1, 5, 6, 8

§158(e) 5

28 U.S.C. 1254(1) 2

Article II, Section (f) 4

No. 80-940

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

LONE STAR STEEL COMPANY

and

UNITED MINE WORKERS OF AMERICA

BRIEF IN OPPOSITION TO A CROSS-PETITION FOR CERTIORARI IN 80-940

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED IN THE CROSS-PETITION IN CASE No. 80-940

Is proposed contract language that would require an employer to agree to extend the collective bargaining agreement, *in toto,* to any of its mines, coal lands, and facilities presently operated or thereafter acquired, or put into later operation by the employer, its subsidiaries, or affiliates at any time during the duration of the contract, a mandatory subject of bargaining within the meaning of 29 U.S.C. §158(d).

OPINIONS BELOW

The Circuit Court opinion may be found at _____ F.2d _____, (Pet. App. A1-A29).[1] The NLRB decision modifying an Administrative Law Judge ruling is reported at 231 NLRB 573, (respectively, Pet. App. C1-C20 and D1-D26).

JURISDICTION

The Court of Appeals denied a timely Petition for Rehearing on September 5, 1980. (Pet. App. B1)[2] Judgment was entered on September 12, 1980. (Cr. Pet. App. 1a)[3] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-STATEMENT OF THE CASE

A. The Facts

Lone Star Steel is a Texas-based steel producer. It uses 36,000 to 40,000 tons of coal a month to make coke for its furnaces. Lone Star acquires its coal in three ways: by purchase; by mining its own leases; and by occasionally letting contracts to mining contractors.

In 1973, Lone Star assumed direct operation of one of its mines near McCurtain, Oklahoma from an independent contractor, and assumed part of the UMWA collective bargaining contract.

Lone Star and other independent operators[4] were notified that their contract would expire November 12, 1974. A nation-

---

[1] "Pet. App." refers to the Appendix in Petition No. 80-716, in which Lone Star is seeking review of another part of the Court of Appeals decision.

[2] The decision and order of the Court of Appeals was entered on July 28, 1980. (Pet. App. A1-A29)

[3] The Cross-Petition in Case No. 80-940, referred to as "Cr. Pet. App." or "Cr. Pet. p._____."

[4] Lone Star was not a member of BCOA's multiemployer bargaining group.

wide strike began Midnight November 12, 1974, and as concerns Lone Star's McCurtain mine has continued except for one 60-day "truce" period from January through March 1975.

Among the various contract provisions giving rise to the instant case were the following:

> The enabling language (the second paragraph of which contains the "successor clause") found at Article I of the Agreement. (Pet. App. E1)
>
> > THIS AGREEMENT made this _____ day of _____, 19_____, between the operators and associations signatory hereto, as parties of the first part (each coal operator which is a signatory hereto being called "Employer") and the International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of each member thereof, as party of the second part, covers all of the bituminous coal mines owned or operated by said first parties. This Agreement carries forward and preserves the terms and conditions of all the various District agreements executed between the United Mine Workers of America and the various operators and coal associations subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.
> >
> > This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided

> that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The application of contract clause (called the "coal lands" clause) found in Article II, Section (f) (Pet. App. E5) reads:

> As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing, and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during this term which may hereafter (during the term of this Agreement) be put into production or use.

This clause was modified to require that it becomes effective *only* if the union first becomes the representative of employees at other locations.

The Company viewed these clauses with alarm. In conjunction with the remainder of Articles I and II, which define the scope and coverage of the contract, it believed the clauses bound assets and operations outside the immediate bargaining unit to the terms of the contract, and would allow the union to prohibit sales, leases, and a variety of business relationships unless a neutral purchaser or lessee agreed to assume the entire UMWA agreement. The Company wanted the right to sell or enter long term mining contracts elsewhere, if needed, and sought to have the contract apply *only* to the McCurtain mine.

In March of 1975, Petitioner filed Unfair Labor Practice Charges against the UMWA alleging, among other things, that

the "coal lands" clause was a non-mandatory subject of bargaining; therefore, the UMWA's strike to obtain the clause violated §8(b)(3) of the Act. Complaint issued and a hearing was held before an Administrative Law Judge. His decision was appealed to the NLRB, which rendered its decision. The Tenth Circuit partially reversed the NLRB. It found that the "coal lands" clause was a permissive subject of bargaining. It upheld the NLRB determination that the successorship clause did not violate §8(e), and was a mandatory subject of bargaining. (Pet. App. A28)

B. The Rulings Below

The Company generally agrees with the NLRB's rendition of the rulings below on the "coal lands" clause.

BRIEF IN OPPOSITION TO CROSS-PETITION No. 80-940

The question of whether the "application of contract" clause is within the "vitally affects" test is also before this Court as Question #2 in *Amax Coal Co. v. NLRB,* 614 F.2d 872 (1980) reversing in part 238 NRLB 214, petitions for cert. pending, Nos. 80-289 and 80-692. The NLRB suggests that if certiorari is granted there, this case should be deferred to that result. It further suggests that if Lone Star's Petition in No. 80-716, regarding the "successorship" issue is granted, then its Cross-Petition here should also be granted. The nub of the NLRB's "conditional" claim for review in these cases is that the "vitally affects" test of §8(d) may be met and passed regardless of whether non-economic provisions are carried along as a secondary consequence of a clause being measured against §8(d).

Lone Star suggests that review of this issue as regards the "coal lands" clause is unwarranted, and the attempt to tie its review to the "successor" question in No. 80-716 is demonstrative only of the sharp departure of that ruling from the prevailing precedent. While the issue in both questions turns on the two-pronged test found in *Teamsters Union v. Oliver,* 358 U.S. 283 (1959), only the successor decision departs from the existing precedent.

The court in *Amax, supra,* correctly and succinctly applied the stringent two-pronged test of *Oliver, supra.* So too, the Tenth Circuit in its "coal lands" decision observed that the broad brush language in the UMWA contract was not a "direct frontal attack" thus the two-pronged requirement was failed.

Of the foregoing §8(d) decisions seeking review, all are consistent except the Tenth Circuit's ruling on the "successorship clause".[5] Despite this, the NLRB has here suggested that the issues in Cases 80-716 and 80-940 are "appropriate" for review *together* because the mere fact that a clause extends a collective bargaining contract in its entirety to "extra unit" assets ". . . does not impair its status as a mandatory subject of bargaining." (Cr. Pet. p.5) The NLRB even suggests that this rule is "settled." (Cr. Pet. p.4) The fact is, the test suggested by the NLRB runs contrary to every precedent, *but for the Lone Star "successorship" ruling.*

The words of §8(d) are words of limitation. Here, the NLRB suggests that §8(d) is a door through which a union may

---

[5] Lone Star has sought certiorari on the Tenth Circuit's successorship ruling in Case No. 80-716.

expand its representation and the contract's coverage by attaching itself and the contract to all employer assets regardless of extra unit consequences. This is not the rule, nor should it be allowed to become the rule.

In Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), he observed that the words of the statute, "wages, hours and other terms and conditions of employment," are words of limitation. He wrote:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, *though the effect of the decision may be necessary to terminate employment.* If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area. (Emphasis Added) (379 U.S. at 233)

CONCLUSION

Lone Star believes that the "vitally affects" exception to §8(d) must always meet *both* the requirements set forth in *Teamsters Union v. Oliver,* 358 U.S. 283 (1959), and that the attachment of an entire contract to all assets of an employer will invariably fail the test. The Court below followed *Oliver, id.,* and properly ruled that the "coal lands" clause was overbroad. The Petition should be denied.

Respectfully submitted,

LYNN PAUL MATTSON
Kothe, Nichols, & Wolfe, Inc.
124 East Fourth Street
Tulsa, Oklahoma 74103
(918) 584-5182

Counsel for Lone Star Steel Company

see 80

7 16